to exercise this power "would place the bench in an invidious position." The Lord Chief Justice is in effect creating a new indictable offense; this may well be regarded as a grave political danger. Finally, it is questioned whether the acts done did tend to public mischief in England. If the fraud became general, international complications might ensue; but the remedy should be by statute.

Perhaps the inquiry whether the acts done did tend to public mischief may be divided into four steps: (1) What acts were done, as a simple question of fact; (2) How great was the tendency towards public mischief; (3) How great a tendency is necessary to make the acts criminal within the law; (4) Is the tendency to public mischief found in the actual case as great as that necessary to make the acts criminal. *Cf. Mixed Questions of Law and Fact*, by Frederick Green, 15 HARV. L. REV. 271, 274. The first two questions are clearly of fact, while the third is a rule of law. The intense struggle over the jury's right to bring in a general verdict in libel cases is evidence of the practical importance of the question, who shall apply the law to the fact. As in the case of notice of dishonor of a bill of exchange, such acts as those under discussion become from time to time the subject of more specific legal rule or definition. Mr. Cohen seems right in his contention that if the decision of the Lord Chief Justice is correct, the latter is in fact, by way of judicial legislation, adding a new crime to the criminal calendar, — that of obtaining a passport intending it for the fraudulent use of another. The right of the judge so to do is unquestioned. 3 STEPHEN, HIST. CR. LAW 352; MARKBY, ELEMENTS, LAW, 5th ed., § 30; *cf.* 2 AUSTIN, JURISPRUDENCE 668. But the law created by such action must always be open to the specific objections of concreteness, incoherency, lack of comprehensiveness, and of its being *ex post facto* with regard to the case where it is first applied. 2 AUSTIN, JURISPRUDENCE 671; 2 STEPHEN, HIST. CR. LAW 359.

INTERNATIONAL LAW AS PART OF THE MUNICIPAL LAW. — Public international law, as distinguished from municipal law, is the body of rules which control the conduct of independent states in their relations to each other. It is a disputed question whether international law, as thus defined, can properly be called law, if Austin's statement be accepted that law is a command imposed by a sovereign and enforced by a physical sanction. See 18 HARV. L. REV. 476. Whatever view may be taken as to the nature of international law when it is applied to disputes between independent states, there is no question but that its rules are law in the strictest sense in the courts of both England and the United States in cases in which private litigants are interested. It has long been held in such cases that the principles of international law are a part of the common law, recognized and applied whenever necessary to work out the rights of private parties. A creditor's attachment against the ambassador of a foreign power is invalid at common law, because international law gives diplomatic representatives immunity from such proceedings. *Triquet* v. *Bath*, 3 Burr. 1478. It is a crime at common law for a subject to violate the duty of neutrality imposed on his sovereign by the rules of international law. *Gideon Henfield's Case*, Whart. St. Tr. 49. These cases and others illustrating the same principle are cited by Mr. J. Westlake in a recent article. *Is International Law a Part of the Law of England?*, 22 L. Quar. Rev. 14 (Jan., 1906).

Mr. Westlake points out that an exception to the general rule that courts administering municipal law will, in proper instances, apply the rules of international law, has been established in England within a year. See *West Rand Central Gold Mining Co.* v. *Rex*, [1905] 2 K. B. 391. In that case relief was denied to the plaintiff, a British subject, who alleged, through a petition of right, that an obligation rested upon the English Crown, as successor to the South African Republic, to pay him for gold commandeered by that republic before it was annexed to England. It seemed to be admitted that international law would have put England under a duty to repay the gold if it had belonged

to an alien, and the court based its decision on the ground that annexation was an act of state and the judiciary had no authority to question the validity of such acts. Mr. Westlake admits the correctness of the constitutional principle that in England executive acts are not subject to review by the courts, but he points out that the court would not have been attacking the validity of the act of state by granting the petition. The court should have recognized the validity of the annexation, but should have then proceeded to decide what consequences followed the act. By holding that the new government became successor to the obligations of the old, the court would not have encroached upon the prerogatives of the Crown, as the state department had made no pronouncement on the subject. The writer traces the growth of the doctrine which resulted in the decision under discussion, and his investigations show that the court made an unfortunate application of a *dictum* in an earlier English case. The English law, as it now stands, seems to be in opposition to that of this country. The United States Supreme Court has no authority to interfere with executive acts as long as they are constitutional, yet it does not hesitate to assume jurisdiction over cases involving the consequences of those acts, and to apply the rules of international law, even though the United States is one of the parties whose rights are involved. See *United States* v. *Percheman*, 7 Pet. (U. S.) 51.

THE LAW RELATING TO "TIED HOUSES." — An English writer in a recent article raises the question whether an agreement by the owner of a public house to purchase all beer sold therein from a particular brewer is binding upon a grantee of the premises who takes with notice of this agreement. *The Law Relating to "Tied Houses,"* 50 Sol. J. 152 (Jan. 6, 1906). In the leading case upon the general topic, Tulk *v.* Moxhay (2 Ph. 774), a covenant by a grantee not to build upon land conveyed, made for the benefit of adjoining property, was held to bind a subsequent purchaser with notice. The writer sets forth two possible theories as to the doctrine of this case: — (1) that it depends on contract and is a burden on the conscience of the assignee; and (2) that it creates an equitable burden on the land analogous to a negative easement. A deliberate choice is made in favor of the latter of these views, as being the one adopted by the later English authorities. See *London & South-Western Railway Co.* v. *Gomm*, 20 Ch. Div. 562, 583; *Formby* v. *Barker*, [1903] 2 Ch. 539, 552. Particular emphasis is laid upon the analogy of the negative easement, which is regarded as perfectly applicable, with the one exception that a restrictive covenant will not follow the land in equity in the absence of notice to the purchaser, whereas a negative easement is binding irrespective of notice. Except, therefore, where a restrictive covenant as to the use of land would run with the land at law, the contention is that no equitable burden is imposed upon a purchaser with notice where the relation of dominant and servient tenements did not subsist as the basis of the original restrictive agreement. Since an agreement by the owner of a public house to buy beer from a particular brewer is for the benefit of an individual or his business, and not for the benefit of a dominant estate, the conclusion is reached that no burden follows the premises into the hands of a purchaser with notice. The writer confesses the existence of substantial authority to the contrary, but submits that the strong *dicta* of later decisions point to an overthrow of these earlier cases. *Cf. John Brothers* v. *Holmes*, [1900] 1 Ch. 188; *Noakes* v. *Rice*, [1902] A. C. 32, 35, 36.

Doubt is cast upon the conclusion here reached by the weakness of the premise, for issue must be taken with the contention that an equitable burden arises only where the analogy of common law easements applies. The doctrine seems to be based rather on the broad equitable principle that where an agreement is made touching property which equity will specifically enforce, an equity is attached to that property which follows it into the hands of a purchaser with notice. For a discussion of the principles involved, see 5 HARV. L. REV. 274; 17 HARV. L. REV. 174, 415.